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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

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BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

THE ANTITRUST LAWS OPERATE TO PROHIBIT RESTRAINTS UNDULY LIMITING COMPETITIVE OPPORTUNITIES OR COMMERCIAL FREEDOM.[1]

A. The use of chain buying power to suppress or eliminate competition or the entry into a conspiracy between horizontal competitive firms to suppress or eliminate competition is necessarily in restraint of trade.

1. A restraint of trade occurs when there is the elimination of freedom to trade in any level of distribution.

The brief for respondents takes the position that it is not a restraint of trade for a chain buying retailer with monopolistic power (Complaint, Pr. 5, p. 5, Pr. 6, p. 10, Pr. 6 g., h., Pr. 8, pp. 11-12) to organize a conspiracy to boycott against its competitor to eliminate competition. It is further contended that a conspiracy to boycott between horizontal competitive firms is not a restraint of trade. Respondents assert that such conduct is neither a restraint of trade nor an unreasonable restraint of trade. At p. 17 of their brief they announce: "The restriction of the alleged conspiracy in this case was not even a 'restraint of trade', because it neither had nor was intended to have any consequences or effect on the market or to the consumer." At p. 18 they announce that "the Act is not concerned with whether a particular retailer, sales agent, consignee or other dealer handles or sells a particular brand or commodity so long as there are

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[1]Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), 24-25, 132-137.

See also: Vernon A. Mund, The Right to Buy—and Its Denial To Small Business, Report for the Select Committee on Small Business, 85th Cong., 1st Sess. 1957, Doc. No. 32.

many others selling it, there being no effect and no purpose to work an effect on prices, quality or quantity available to the public and no monopoly, particularly where numerous competing brands are available."

It is respectfully urged that the basic error in the respondents' position is that they fail to concede that the antitrust laws operate to insure a free and open market, in every level of the distributive process. The antitrust laws clearly operate to prohibit conduct which prevents free entry and access into the channels of trade and commerce. (See Kirkpatrick, Commercial Boycotts as Per Se Violations of the Sherman Act, 10 G. Washington L. Rev., 302, 387.)

In *United States v. Yellow Cab Co.*, 1947, 332 U.S. 218, this Court stated, at 226:

> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate commerce. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in Indiana Farmer's Guide Co. v. Prairie Farmer Co., 293 U.S. 268, 279, 55 S.Ct. 182, 185, 79 L. Ed. 356, 'The provisions of §§ 1 and 2 have both a geographic and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce'."

Accordingly, it is clear that the antitrust laws are fundamentally concerned with prohibiting conspiracies or the use of monopolistic power which prevent, suppress or eliminate competition in any level or channel of commercial conduct. A single competitor, given express rights under Section 4 of the Clayton Act, has a cause of action against those who have conspired to suppress or eliminate his competition. A trader has the right to be free of a conspiracy designed to suppress or eliminate his competition under Section 4. *Albert Pick Barth Co. v. Mitchell Woodbury Corp.*, 1st Cir., 1930, 41 F. 2d 148; 1932, 57 F. 2d 96; *Monarch Tobacco Works v. American Tobacco Co.*, W. D. Ky., 1908, 165 Fed. 774; *Victor Talking Machine Co. v. Kemeny*, 3d Cir., 1921, 271 Fed. 810; *William Goldman Theatres v. Loew's Inc.*, 3d Cir., 1945, 150 F. 2d 738; *Ball v. Paramount Pictures, Inc.*, 3d Cir., 1948, 169 F. 2d 317; *Package Closure Corp. v. Sealright Company*, 2nd Cir., 1944, 141 F. 2d 972; *Parmelee Transportation Co. v. Keeshin*, N. D. Ill., 1956, 144 F. Supp. 480, 485, as stated there:

> "The right to deal with whom one pleases does not include 'agreeing or combining with another person in order to deprive a third person of a complete freedom of contract', United States v. Interstate Circuit, Inc., D.C.N.D. Tex., 1937, 20 F. Supp. 868, 872."

The admission of a conspiracy to single out a competitor and cause it direct harm so as to eliminate its competition admits a distinct offense under the Sherman Act. *United States v. Kissel*, 1910, 218 U.S. 601.

Equally clear is that monopolistic power may not be used to suppress, eliminate or prevent competition.

In addition to *United States v. Griffith*, 1948, 334 U.S. 100, see *American Federation of Tobacco Growers v. Neal*, 4th Cir., 1950, 183 F. 2d 869; *White Bear Theatre Corp. v. State Theatre Corp.*, 8th Cir., 1942, 129 F. 2d 600; *Kobe, Inc. v. Dempsey Pump Co.*, 10th Cir., 1952, 198 F. 2d 416.

Such use of conspiratorial power or monopolistic power is illegal per se. *International Salt Co. v. United States*, 1947, 332 U.S. 392. It is clear that in this setting of suppression or exclusion of competition by conspiracy or monopolistic power allegations in an antitrust complaint may be phrased in terms of the single plaintiff, both in the object and effect of the conspiracy or monopoly power. *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, and cases cited supra.

The brief for respondents admits that there existed a conspiracy against petitioner, but it attempts to deny that it has admitted the allegations of petitioner as to monopolistic chain buying power (R. 11) of respondent Broadway-Hale. (Brief for respondents, pp. 11-12.) But clearly the issues of monopolistic chain buying power and monopolistic intent condemned by Section 2 of the Sherman Act cannot be ended by sole reference to the total number of competitors in a given market. *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, 166-173 (Percentage of total number of theatres of defendants to total number of theatres operated by non-defendants irrelevant); *Times Picayune Pub. Co. v. United States*, 1953, 345 U.S. 594, 615-621 (market control viewed in terms of sales of classified lineage,

general display lineage); *United States v. American Tobacco Co.*, 1946, 328 U.S. 781 (monopoly analyzed in terms of percentage of production, net worth, advertising expenditures, percentage of purchases of tobacco, and percentage of cigarette sales).

Mere reference to the advertising pages of the telephone book accordingly does not allow the petitioners to assert that the issues of monopolistic power and specific intent to monopolize have been eliminated by their affidavits in summary judgment.

2. Group refusals to deal by otherwise competitive firms are unlawful because they unduly restrict competitive opportunities or commercial freedom, replace the free market with group power, and create a power to fix prices.

The respondents have further urged that they have the lawful power to determine who shall or shall not be a competitive trader. Private parties it is urged can arrogate unto themselves the determination of who shall exist in the market place consistent with the antitrust laws. This rests on the argument that an unlawful group refusal to deal is unlawful only when there is coercion involved and only when a group is being boycotted. (Brief for Respondents, pp. 51-65.) But as to the first contention, the respondents have conveniently ignored the point that the term boycott is not restricted to secondary or coercive conduct. Even if it were the complaint alleges that Broadway-Hale coercively used its monopolistic chain buying power to organize a group refusal to deal. (R. 11-12.) Further, under the complaint the petitioner may prove the coercion of Broadway-Hale in combination with

one other manufacturer or distributor against other respondents.

36 *Am. Jur.*, Monopolies, Combinations, etc., § 27, p. 508, defines boycotts as follows:

> "The law recognizes what may be called two species of boycotts—one a primary boycott that is applied directly and alone to the offending person, by withdrawing from him all business relations on the part of the organization that initiated the boycott, and the other a secondary boycott that becomes effective when the members of the organization refuse to have any business relations with persons dealing with the offender until he has yielded to the demands of the organization."

This Court as has previously been shown has held that every group refusal to deal is per se unlawful under the Sherman Act. The *Binderup* case, supra, and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 1951, 340 U.S. 211, both were essentially primary boycotts by competing firms. Thus the Court stated in *Binderup*, 263 U.S. 291, 312:

> "It is doubtless true that each of the distributors, acting separately could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor."

And, of course, *Binderup* completely disposes of the argument that a boycott is unlawful only when organized against a group. (See contentions, Brief for Respondents, pp. 59-60.)

The contention that the antitrust laws applied only to secondary boycotts was expressly rejected in *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, D.C. Mont. 1958, 163 F. Supp. 274, 281-283.

An agreement by the powerful interstate suppliers of competitive merchandise involved here to eliminate or suppress competition, an unlawful end, by a group refusal to deal or boycott, an unlawful means, is necessarily a conspiracy in restraint of trade: (a) it is a non-ancillary agreement between competitors limiting competition, unlawful at common law. *United States v. Addyston Pipe & Steel Co.*, 6th Cir., 1898, 85 Fed. 271 (see Vernon A. Mund, op. cit., Chap. I, pp. 1-9); (b) it has the power by reference to the number of respondents and by reference to the quality and demand for their articles of commerce to dictate control and access to the market place, a power which has admittedly been exercised. *Eastern States Retail Lumber Dealers Association, et al. v. United States*, 1914, 234 U.S. 600; (c) it has the power to fix prices and there would exist a natural tendency for this group, being composed of the leading suppliers of merchandise, in league with the dominant retailer, successful in their agreement to boycott petitioner, to control prices. *F.T.C. v. Fashion Originators' Guild*, 2nd Cir., 1940, 114 F. 2d 180; (d) it has replaced the free market with group power which by reference to

the obvious need of the products involved for successful retail operation, stands as a necessary threat to all existing and potential competitors. *United States v. New Orleans Ins. Exch.*, D.C. La. 1957, 148 F. Supp. 915, 920, affirmed 355 U.S. 22. See also *United States v. Nationwide Trailer Rental System, Inc.*, D.C. Kan. 1957, 156 F. Supp. 800, affirmed 355 U.S. 10; (e) it has deprived a trader of his right to compete and has suppressed his competitive opportunities by unlawful means. *Binderup v. Pathe Exchange*, supra; *William Goldman Theatres v. Loew's, Inc.*, 3d Cir., 1945, 150 F. 2d 738.

It is clear that Justice Stone would not support the contentions of the respondents. In *Bigelow v. RKO*, 1945, 327 U.S. 251, he expressly held that a conspiracy to discriminate violated the antitrust laws regardless of whether or not it actually fixed prices, and held that a private trader had the right to be free of the restraints of an unlawful conspiracy. (327 U.S. 251, 262.) The opinion expressly rested on the assumption that the fixing of prices was not necessarily involved. (327 U.S. 251, 266.)

The quotations from *Apex* cited by respondents at page 31 of their brief expressly reserved the phrase "or otherwise control the market to the detriment of purchasers or consumers of goods and services", "or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market", "or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition". A conspiracy to eliminate or

suppress competition and a trade boycott are the very types of activity which take from purchasers or consumers the advantages of free competition.

II.

THE RESPONDENTS CANNOT CLAIM ANY LEGAL DEFENSE TO THEIR CONDUCT.

A. "Public injury" in the Radovich case was decided as a matter of law.

Respondents' contention that the doctrine of "public injury" precludes any liability under the antitrust laws is based on the argument that the invalidation of "public injury" in the *Radovich* case is restricted to the allegations of that complaint. (Brief for Respondents, p. 47.) But the briefs in the *Radovich* case simply do not support this contention. The doctrine of "public injury" in *Radovich* was invalidated as a matter of law. The following legal arguments were made in the *Radovich* case, inter alia: (1) The antitrust laws establish themselves the standards of commercial conduct deemed inimicable to the public good. (Brief for Petitioner, *Radovich v. National Football League, et al.*, United States Supreme Court, No. 94, p. 20, Brief for the United States as Amicus Curiae, pp. 11-14.) (2) Section 4 of the Clayton Act expressed a Congressional purpose to afford relief as to conduct forbidden by the antitrust laws which caused personal injury. (Brief for Petitioner, *Radovich v. National Football League,* United States Supreme Court, No. 94, pp. 19, 22.) (3) The lower courts had held

that a prima facie case was established under Section 4 upon the showing of a violation of the antitrust laws and injury arising from the violation. (*Id.*, at pp. 23-25); *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 6th Cir., 1903, 127 Fed. 23, aff'd 1906, 203 U.S. 390; *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n*, 3d Cir., 1907, 152 Fed. 864, 874; *Monarch Tobacco Works v. American Tobacco Co.*, C.C. Ky., 1908, 165 Fed. 774, 777; *Albert Peck Barth Co. v. Mitchell Woodbury Corp.*, 1st Cir., 1932, 57 F. 2d 96. The private antitrust action is simply an action supported by Congress which gives an injured party direct relief against conduct condemned in the antitrust laws. *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 1906, 203 U.S. 390, 397. (4) The concept of public injury is a judicial imposition on the antitrust laws which is not supported by the words of Section 4 of the Clayton Act or by Congressional purposes. (*Id.*, at pp. 19, 22.) The Senate debates over the enactment of the Sherman Act clearly expressed a desire to prevent the oppression of the small trader, and to establish the common law doctrines of the free market in his favor. See Vernon A. Mund, op. cit., p. 13. (5) The concept of public injury allows each Court to express its views on what it considers the public good and permits the antitrust laws to become a sea of doubt. (*Id.*, at pp. 34-35.) (6) Basic to the concept of "public injury" is the categorizations of conduct which alone are in violation of the antitrust laws to price fixing, division of territories, deterioration of quality, limitations on production. But it is clear that this Court has expressly

held that these categories do not exhaust the type of conduct banned in the Sherman and Clayton Acts. (Petitioner's Reply Brief, *Radovich v. National Football League, et al.*, United States Supreme Court, No. 94, pp. 18-19.)

The doctrine of public injury did not emanate from this Court since the Court had held in the *Binderup* case that a private action involved only the questions of whether the matters were matters of interstate trade and commerce, and whether the conduct of the defendants was in restraint of such trade.

Respondents also contend that a number of lower Court cases allow them to assert the claim of no "public injury". (Brief for Respondents, pp. 42-43.) They cite cases decided after the *Radovich* decision. But none of the cases cited by respondents therein discussed the *Radovich* decision.

B. There is no legal defense to a conspiracy to suppress the business of a trader by group boycott.

1. The decisions cited by the respondents do not support the contention that the antitrust laws allow a conspiracy to boycott between horizontal competitive interstate firms alone or at the instance of a monopolistic chain buyer.

A conspiracy to boycott is illegal per se. Any combination agreeing to refuse to deal is per se engaged in unlawful conduct. Such a conspiracy is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil, whether the boycott is accomplished by express contract or by some more subtle means; whether the participants possess market control,

whether the amount of interstate commerce affected is large or small, or whether the effect of the agreement is to aid or hinder public consumption. These are the words of this Court in *United States v. McKesson & Robbins, Inc.*, 1955, 351 U.S. 305, a price fixing case, as applied to the conspiracy to boycott, as unreasonable per se as is the conspiracy to fix prices.

But respondents have cited many cases which are claimed to show a legal defense here. (Brief for Respondents, pp. 36-41.) But no Appellate Court cited has held that a conspiracy to suppress competition by refusal to deal between horizontal competitors who, on an open market basis, entertain business dealings with potential or existing distributors or retailers equipped to handle their merchandise is a lawful practice under the Sherman Act. While *Shotkin v. General Electric Co.*, 10th Cir., 1948, 171 F. 2d 236, seemed to indicate the contrary, the Tenth Circuit has now expressly held that the case involved only the situation where the Court was not convinced that the complaint there was bona fide. *New Home Appliance Center v. Thompson*, 10th Cir., 1957, 250 F. 2d 881, 883. This case expressly withdrew the "test of public injury" and, rather, held that any horizontal agreement among local competitors to suppress competition is illegal per se. (*Id.*, at 884.)

Other appellate cases cited by the respondents were based on the ground that a single manufacturer who does business on an exclusive agency basis can lawfully decline to deal with an existing agent who has no tenure in such an agency situation. *Fedderson*

Motors v. Ward, 10th Cir., 1950, 180 F. 2d 519, as explained in *New Home Appliance Center v. Thompson,* supra; *Hudson Sales Corp. v. Waldrip,* 5th Cir., 1954, 211 F. 2d 268; *Packard Motor Car Co. v. Webster Motor Car Co.,* D.C. Cir., 1957, 243 F. 2d 418. It is noted that the rule announced in these automobile cases was overruled by the Congress, Automobile Dealers Act, Aug. 8, 1956, 70 Stat. 1125, 15 U.S.C. 1221 ff.

Kinnear Weed Corp. v. Humble Oil & Refining Co., 5th Cir., 1954, 214 F. 2d 891, was not a conspiracy case, and *Miller Motors v. Ford Motor Co.,* 4th Cir., 1958, 252 F. 2d 441, did not involve a conspiracy to boycott.

Ruddy Brook Clothes v. British & Foreign Marine Ins. Co., 7th Cir., 1952, 195 F. 2d 86 did not involve a plaintiff who could offer the merchandise of the defendants for resale in the channels of distribution, or who was dependent on the defendants for his business opportunities. The case was decided before the statement of this Court in *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594 that group boycotts, or concerted refusals to deal, clearly run afoul of Section 1.

CONCLUSION.

The complaint herein disclosed manifest public wrongs condemned by this Court as being in per se violation of the antitrust laws. These public wrongs were not contested by the respondents who have

sought to treat the antitrust laws as allowing a defense of lack of "public injury" even though conduct has been perpetrated which is in per se violation of the standards of the antitrust laws. The antitrust laws as a charter of liberty protect the private trader from the suppression and destruction of his business when accomplished by means forbidden by these laws. Petitioner, a competitive trader, has been erroneously denied a trial by his peers under a statute enacted to provide for equal and untrammeled access to the market place, free of conspiratorial refusals to deal or the use of monopolistic power to eliminate competition.

It is respectfully submitted that the judgment is wrong and should be reversed.

Dated, San Francisco, California,
February 12, 1959.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1958.

Klor's, Inc., Petitioner, v. Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 6, 1959.]

Mr. Justice Black delivered the opinion of the Court.

Klor's, Inc., operates a retail store on Mission Street, San Francisco, California; Broadway-Hale Stores, Inc., a chain of department stores, operates one of its stores next door. The two stores compete in the sale of radios, television sets, refrigerators and other household appliances. Claiming that Broadway-Hale and 10 national manufacturers and their distributors have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, Klor's brought this action for treble damages and injunction in the United States District Court.[1]

[1] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 of the Act reads, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, states, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

In support of its claim Klor's made the following allegations: George Klor started an appliance store some years before 1952 and has operated it ever since either individually or as Klor's, Inc. Klor's is as well equipped as Broadway-Hale to handle all brands of appliances. Nevertheless, manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others[2] have conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. Broadway-Hale has used its "monopolistic" buying power to bring about this situation. The business of manufacturing, distributing and selling household appliances is in interstate commerce. The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.

The defendants did not dispute these allegations, but sought summary judgment and dismissal of the complaint for failure to state a cause of action. They submitted unchallenged affidavits which showed that there were hundreds of other household appliance retailers, some within a few blocks of Klor's who sold many competing brands of appliances, including those the defendants refused to sell to Klor's. From the allegations of the complaint, and from the affidavits supporting the motion for summary judgment, the District Court concluded that the controversy was a "purely private quarrel" between Klor's and Broadway-Hale, which did not amount to a "public wrong proscribed by the [Sherman] Act." On this ground the complaint was dismissed and summary

[2] The appliance manufacturers named in the complaint are: Admiral Corp., Emerson Radio and Phonograph Corp., General Electric Co., Olympic Radio and Television, Inc., Philco Corp., Rheem Manufacturing Co., Radio Corp. of America, Tappan Stove Co., Whirlpool Corp., Zenith Radio Corp.

judgment was entered for the defendants. The Court of Appeals for the Ninth Circuit affirmed the summary judgment. 255 F. 2d 214. It stated that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." 255 F. 2d, at 233. It held that here the required public injury was missing since "there was no charge or proof that by any act of defendants the price, quantity or quality offered the public was affected nor, that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality . . . ." *Id.*, at 230. The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. We granted certiorari to consider this important question in the administration of the Sherman Act. 358 U. S. 809.

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of *Standard Oil Co.* v. *United States*, 221 U. S. 1, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id.*, at 59–60. The Court construed § 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . . ." *Id.*, at 61. The effect of both sections,

the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce. *Id.*, at 57, 61; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 609. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U. S., at 58, 65.[3] As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. *Id.*, at 63–68.[4]

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allega-

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[3] See also *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, where the Court noted that the statute forbade all "acts or contracts or agreements or combinations . . . which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."

[4] See also *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 395–401; *Radovich* v. *National Football League*, 352 U. S. 445, 453–454. In this regard the Sherman Act should be contrasted with § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (b), which requires that the Commission find "that a proceeding by it . . . be to the interest of the public" before it issues a complaint for unfair competition. See *Federal Trade Comm'n* v. *Klesner*, 280 U. S. 19, 27. But cf. *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466–467.

[5] See, *e. g.*, *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 625; *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5.

tions that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466, 467–468. Cf. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart* v. *Seagram & Sons*, 340 U. S. 211, 213, "Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States* v. *Patten*, 226 U. S. 525, 542.

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another,[6] nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to

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[6] Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, with *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 719–723; *Lorain Journal Co.* v. *United States*, 342 U. S. 143.

the economy.[1] Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." *International Salt Co.* v. *United States*, 332 U. S. 392, 396.

The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for trial.

Reversed.

MR. JUSTICE HARLAN, believing that the allegations of the complaint are sufficient to entitle the petitioner to go to trial, and that the matters set forth in respondents' affidavits are not necessarily sufficient to constitute a defense irrespective of what the petitioner may be able to prove at the trial, concurs in the result.

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[1] The court below relied heavily on *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by § 1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the light of the fact that the defendant in that case was a labor union. The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives. See *United States* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U. S. 797. Moreover, cases subsequent to *Apex* have made clear that an effect on prices is not essential to a Sherman Act violation. See, *e. g.*, *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466.